AND BRIEFS

No. 16-341

IN THE

Supreme Court of the United States

TC HEARTLAND LLC,

Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* 33 PRACTICING-ENTITY PATENT OWNERS IN SUPPORT OF RESPONDENT

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Library of Congress

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. PRACTICING-ENTITY PLAINTIFFS HAVE A UNIQUE INTEREST IN FILING SUIT IN A JUDICIAL DISTRICT IN WHICH THEY PRACTICE THE INVENTION AND INFRINGEMENT HAS OCCURRED 3

II. REINSTATING PRE-1988 PATENT VENUE LAW WOULD GREATLY PREJUDICE THE *AMICI* AND OTHER PRACTICING-ENTITY PATENT OWNERS 5

III. CURRENT PATENT VENUE LAW IS ALREADY FAIR AND BALANCED AND COULD BE IMPROVED THROUGH ADJUSTMENTS TO TRANSFER LAW 6

Table of Contents

Page

IV. IF PATENT VENUE LAW IS TO BE CHANGED, IT SHOULD CONSIDER THE INTERESTS OF PRACTICING-ENTITY PATENT OWNERS 7

CONCLUSION 11

APPENDIX 1a

TABLE OF CITED AUTHORITIES

Page

CASES

Dodd v. United States,
545 U.S. 353 (2005) 8

Federal Maritime Com. v. Seatrain Lines, Inc.,
411 U.S. 726 (1973) 8

Fourco Glass Co. v. Transmirra Products Corp.,
353 U.S. 222 (1957) 4, 5

Lewis v. City of Chicago,
560 U.S. 205 (2010) 7

United States v. Rodgers,
466 U.S. 475 (1984) 8

United States v. Yermian,
468 U.S. 63 (1984) 8

VE Holding Corp. v. Johnson Gas Appliance Co.,
917 F.2d 1574 (Fed. Cir. 1990) 3

STATUTES AND OTHER AUTHORITIES

28 U.S.C. § 1391(a) 2, 7

28 U.S.C. § 1391(c) 2, 7

28 U.S.C. § 1400(b) 2, 4, 7

Cited Authorities

Page

28 U.S.C. § 1404(a) 6, 7

Adam Mossoff, *Weighing the Patent System, The Washington Times* (2016) 10

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Dennis Crouch, *Law Professors Call for Patent Venue Reform*, PATENTLYO (2016) 3

Gene Quinn, *Hatch Says Patent Venue Reform Likely Regardless of SCOTUS Decision in TC Heartland* 10

Gregory H. Lantier, Wei Wang, Derek Gosma, Mary (Mindy) V. Sooter, WilmerHale, *WilmerHale Eastern District of Texas Newsletter: September 2016* 7

PwC, *2016 Patent Litigation Study: Are We at an Inflection Point?* 3

S. 2733 ..... 8, 9

Sup. Ct. R. 37.6 1

Tr. of Hearing Before the Senate Subcommittee on Courts, Intellectual Property, and the Internet, September 13, 2016 10

INTEREST OF *AMICI CURIAE*

Each *amicus* (signatory to this brief) is a practicing-entity patent owner who has filed a patent infringement action in the district in which that patent owner principally operates its business. Though the *amici* have no stake in the parties to this litigation, they have an interest in the outcome of this case to the extent that it may affect venue in their pending litigation. Specifically, the *amici* have an interest that any change in patent venue law be fair and balanced, including the protection of the interests of practicing-entity patent owners like themselves.[1]

SUMMARY OF ARGUMENT

For the last 26 years, the settled law of patent venue has been that a patent owner can file an action for patent infringement in any district where personal jurisdiction over a corporate defendant will lie. The concentration of a high percentage of patent cases in a few judicial districts has led to numerous calls for patent venue reform, including some even advocating to reinstate the unduly restrictive pre-1988 venue requirements.

These demands for patent venue reform, however, overlook the most critical component of the patent system: the inventor. In particular, the proposed reforms ignore the unique interests of the inventor or practicing-entity

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1. In accordance with Supreme Court Rule 37.6, the *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Both Petitioner and Respondent have provided consent, via e-mail, to the filing of this brief.

patent owner who desires to bring an infringement action in the district in which that inventor or patent owner principally operates its business and where infringement has occurred. Reinstating the strict pre-1988 standards for patent venue would unfairly burden innocent practicing-entity patent owners, particularly small businesses and individual inventors who want to stop the infringing activities of a corporate defendant but have to file suit in a distant judicial district solely because that company is headquartered there. Accordingly, patent owners should be permitted to file infringement actions where the defendant has committed acts of patent infringement in the practicing-entity patent owner's home district.

The existing law of patent venue, which has been in place for the past 26 years, is fair and balanced. Safeguards already exist to protect defendants from being unfairly pulled into a burdensome judicial district. For example, current venue law permits actions to be transferred to a different judicial district, including the district where that defendant resides, if the original forum is truly unfair. Flexible venue requirements like those that are currently in place, coupled with the provision for transfer as a safeguard, is a more equitable approach to patent venue than reinstating the pre-1988 requirements.

Since the Question Presented in this case concerns alleged ambiguity regarding the relationship between 28 U.S.C. §§ 1391(a) and (c) and 1400(b), the resolution of that ambiguity should be left to Congress. Congress already appears to have patent venue reform in its sights, such as the proposed VENUE Act introduced last session. Regardless of the outcome of this case, Congress is likely to act on patent venue reform soon, possibly this year.

Accordingly, the *amici* do not believe the existing law on venue for patent infringement requires modification. But, in any event, any change in existing law should take into account the interests of inventors and practicing-entity patent owners who are operating in the judicial district where infringement has occurred.

ARGUMENT

I. PRACTICING-ENTITY PLAINTIFFS HAVE A UNIQUE INTEREST IN FILING SUIT IN A JUDICIAL DISTRICT IN WHICH THEY PRACTICE THE INVENTION AND INFRINGEMENT HAS OCCURRED

For the past 26 years, patent owners have been able to file an action for patent infringement in "any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced." *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1583 (Fed. Cir. 1990). Over the past several years, there has been a rising crescendo of alarm regarding the large number of patent infringement actions concentrated in just a few judicial districts, particularly the District of Delaware, the Eastern District of Texas, the Eastern District of Virginia, and the Western District of Wisconsin.[2]

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2. *See, e.g.*, *See* Dennis Crouch, *Law Professors Call for Patent Venue Reform*, PATENTLYO (2016), http://patentlyo.com/patent/2016/07/professors-patent-reform.html. *See also*, PwC, *2016 Patent Litigation Study: Are We at an Inflection Point?*, https://www.pwc.com/us/en/forensic-services/publications/assets/2016-pwc-patent-litigation-study.pdf, at 15.

These concerns have led many, including some of the other *amici* in this case, to call for drastic changes in patent venue law that would greatly limit where patentees can file infringement actions. Some have even urged this Court to take a giant leap backwards and reinstate the rule in *Fourco Glass* (the pre-1988 law), under which a defendant can be sued for patent infringement only (1) "in the judicial district where the defendant resides [is incorporated]" or (2) "where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 229 (1957). Those calls for revamping patent venue law are misguided.

In this rush to restrict patent venue, one important point often gets overlooked: Practicing-entity plaintiffs have a unique interest in filing suit in a judicial district in which they practice the invention *and* infringement has occurred. To illustrate, each signatory to this brief is a practicing-entity patent owner who has brought a patent infringement action in the district in which that patent owner principally operates its business. The 33 signatories and their associated infringement actions are listed in Appendix A. Any change in patent venue law should also take into account these uniquely situated practicing-entity patent owners. Indeed, one study indicates that practicing-entity patent owners bring actions in their home district in 44% of cases. *See* Colleen V. Chien and Michael Risch, Recalibrating Patent Venue, Santa Clara Univ. Legal Studies Research Paper No. 10-1, https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2834130, at 31.[3] The issues raised herein are, thus, not insignificant.

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3. Based on a random sampling of data from 1000 actual federal court filings in 2015. *See* pp. 25-26 for a description of the

II. REINSTATING PRE-1988 PATENT VENUE LAW WOULD GREATLY PREJUDICE THE *AMICI* AND OTHER PRACTICING-ENTITY PATENT OWNERS

Even if the Court determines that judicial districts with *de minimis* connection to either party are improper forums, legitimate practicing-entity patent owners should be able to bring an action in the district where they normally operate. Many of the *amici* are inventors and small businesses that understandably bring suit in their home district where infringement is occurring. It is unfair to require these patent owners to file their actions in a distant venue, or in multiple venues in the case of multiple defendants.

Where a defendant has committed acts of infringement in the district in which a practicing-entity patent owner principally operates its business (*i.e.*, where personal jurisdiction over the defendant would lie), the patent owner should have the option of bringing an action for infringement in that district. The existing venue laws, which have been in effect for the past 26 years, have appropriately granted patent owners that option.

Reinstating pre-1988 venue law (the rule in *Fourco Glass*) would severely limit the ability of a practicing-entity patent owner to assert its patents in the district where it primarily operates its business. It would also lead to a spate of transfer motions by patent defendants seeking

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study methodology, which employed Lex Machina, a service that sources case data from PACER. *See also* https://lexmachina.com/what-we-do/how-it-works/.

to transfer existing cases to more beneficial forums for defendants. This would increase the burden and expense on patent owners for existing infringement actions. The study cited above indicates that, based a large random sampling of cases from 2015, the pre-1988 patent venue law would have resulted in 52% of practicing entities being uprooted from the districts in which they originally filed. Chien and Risch, *op. cit.*, at 34. This provides a glimpse into just how impactful a return to pre-1988 patent venue law would be.

III. CURRENT PATENT VENUE LAW IS ALREADY FAIR AND BALANCED AND COULD BE IMPROVED THROUGH ADJUSTMENTS TO TRANSFER LAW

The existing patent venue law is already fair and balanced despite the concentration of patent cases in certain popular forums. But for all the cases filed in those districts, the majority of defendants have willfully chosen to do business in that district. And, for those defendants who truly do not have a tie to the chosen forum, safeguards already exist, including the ability of a defendant, under 28 U.S.C. § 1404(a), to move for a change of venue (transfer of the case to a different district court) under appropriate circumstances. *See* 28 U.S.C. § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented"). Courts often transfer patent infringement actions under § 1404(a). For example, one 2016 study revealed that 57% of transfer motions in the Eastern District of Texas had been granted.

Gregory H. Lantier, Wei Wang, Derek Gosma, Mary (Mindy) V. Sooter, WilmerHale, *WilmerHale Eastern District of Texas Newsletter: September 2016*, https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179882731.

Some complain that § 1404(a) has not operated effectively because certain courts have, at times, shown hostility to motions to transfer. *See, e.g.*, Chien and Risch, *op. cit.*, at 18-19 ("For a number of years, . . . the Eastern District [of Texas] had a reputation for being unusually hostile to motions to transfer"). Rather than "throwing out the baby with the bath water" by reinstating pre-1988 patent venue law, as Petitioner and its *amici* urge, the current venue standard could be improved through appropriate legislative action. For example, one proposal would increase the likelihood of transfers by mandating that full discovery be stayed until a district court has ruled on a transfer motion. Chien and Risch, *op. cit.*, at 24. This would alleviate the concern that courts are reluctant to entertain transfer motions.

IV. IF PATENT VENUE LAW IS TO BE CHANGED, IT SHOULD CONSIDER THE INTERESTS OF PRACTICING-ENTITY PATENT OWNERS

The Question Presented in this case concerns uncertainty regarding the interplay between 28 U.S.C. §§ 1391(a) and (c) and 1400(b). Correcting such an alleged statutory ambiguity is properly within the purview of Congress. *See Lewis v. City of Chicago*, 560 U.S. 205, 215, 217 (2010) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended . . . If [an] effect

was unintended, it is a problem for Congress, not one that federal courts can fix."); *United States v. Yermian*, 468 U.S. 63, 73 n.13 (1984) ("[T]his Court should not rewrite the statute in a way that Congress did not intend."); *Dodd v. United States*, 545 U.S. 353, 359 (2005) ("Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted."); *United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress."); *Federal Maritime Com. v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973) ("We are not ready to meet that need by rewriting the statute and legislative history ourselves.").

There are already efforts underway in Congress to address the calls for patent venue reform. One such effort is S. 2733, the "Venue Equity and Non-Uniformity Elimination Act of 2016" ("VENUE Act"). Under this proposal, a patent infringement action could be brought only in the following judicial districts:

- the defendant has its principal place of business or is incorporated;
- the defendant has committed an act of infringement of a patent in suit and has a regular and established physical facility that gives rise to the act of infringement;
- the defendant has agreed or consented to be sued;
- an inventor named on the patent conducted research or development that led to the application for the patent in suit; or

- a party has a regular and established physical facility and has managed significant research and development for the invention claimed in the patent, has manufactured a tangible product alleged to embody that invention, or has implemented a manufacturing process for a tangible good in which the process is alleged to embody the invention.

S. 2733, https://www.congress.gov/114/bills/s2733/BILLS-114s2733is.pdf.

The VENUE Act reflects an attempt to balance the interests of defendants *as well as* patent owners. The VENUE Act is but one example of a balanced approach to reform, and the *amici* do not necessarily endorse any one proposal over another. The Act was cited merely as an example of a potential legislative solution to the concerns regarding forum shopping.

The legislative process can accommodate the interests of justice for all stakeholders. One commentator put it this way:

> Valid reform is balanced and fair, improving a legal system by correcting abuses by all the relevant stakeholders who strategically exploit the legal rules. It is unhealthy for the patent system and for innovation to myopically focus only on abuses by some patent owners without addressing, let alone even acknowledging, the exact same abuses by users or infringers of patented innovation.

Adam Mossoff, *Weighing the Patent System, The Washington Times* (2016), http://www.washingtontimes.com/news/2016/mar/24/adam-mossoff-weighing-the-patent-system/.

Senator Orrin Hatch (R-UT) recently predicted that Congress will tackle patent venue reform this year regardless of what the Court decides in this case. Gene Quinn, *Hatch Says Patent Venue Reform Likely Regardless of SCOTUS Decision in TC Heartland*, http://www.ipwatchdog.com/2017/02/16/hatch-venue-reform-likely-scotus-tc-heartland/id=78495/. Hatch, as Chairman of the Senate Republican High-Tech Task Force, is in a good position to make such a prediction. *Id.* Therefore, the Court should preserve the *status quo* regarding the current venue statute and permit Congress to address patent venue.

Moreover, the Chairman of the Senate Subcommittee on Courts, Intellectual Property, and the Internet, Darrell E. Issa, recently acknowledged the role of Congress in addressing patent venue reform, stating, "I obviously have a very strong personal interest because if this case cannot be resolved fully—or even if it is—it could affect whether or not legislation goes forward here. And from my understanding, the Fed circuit pretty much said in the three-judge panel: We will let Congress handle it." Tr. of Hearing Before the Senate Subcommittee on Courts, Intellectual Property, and the Internet, September 13, 2016, https://judiciary.house.gov/wp-content/uploads/2016/09/114-90_22119.pdf, at 23. The *amici* agree that venue reform should wait until Congress can appropriately legislate the issue.

CONCLUSION

For the foregoing reasons, the *amici* respectfully request that the Court preserve the *status quo* applicable to the current patent venue statute by affirming the decision below and leaving patent venue reform efforts to Congress.

Respectfully submitted,

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APPENDIX

APPENDIX A — LIST OF SIGNATORIES AND THEIR ASSOCIATED CASES

Aamsco Lighting Inc.
District of South Carolina

2:16-cv-01809
Aamsco Lighting Inc v. Bulbrite Industries Inc

Automated Tracking Solutions, LLC
Eastern District of Virginia

1:12-cv-00052
Automated Tracking Solutions, LLC v.
SimplyRFiD Inc.

1:12-cv-00053
Automated Tracking Solutions, LLC v.
TeleTracking Technologies, Inc. et al

1:12-cv-01304
Automated Tracking Solutions, LLC v.
TeleTracking Technologies, Inc. et al

1:12-cv-01313
Automated Tracking Solutions, LLC v.
Awarepoint Corporation et al

1:14-cv-01758
Automated Tracking Solutions, LLC v.
Bon Secours Health System, Inc. et al

Appendix A

1:14-cv-01759
Automated Tracking Solutions, LLC v.
EKAHAU, INC.

2:11-cv-00424
Automated Tracking Solutions, LLC v.
Awarepoint Corporation et al

2:12-cv-00038
Automated Tracking Solutions, Inc. v.
Impinj, Inc.

3:15-cv-00142
Automated Tracking Solutions, LLC v.
ValidFill, LLC et al

Avionics Support Group, Inc.
Southern District of Florida

1:16-cv-25310
Avionics Support Group, Inc. v. Navaero, Inc. et al

Blue Gentian, LLC
Southern District of Florida

9:12-cv-81169
Blue Gentian, LLC v. Telebrands Corporation

9:12-cv-81170
Blue Gentian, LLC v. Tristar Products, Inc.

Appendix A

9:12-cv-81171
Blue Gentian, LLC v. MAGIXHOSE

9:13-cv-80853
Blue Gentian, LLC et al v.
New Product Solutions, Inc. et al

Bragel International, Inc.
Central District of California

2:15-cv-08364
-R-FFM Bragel International, Inc. v.
Charlotte Russe, Inc.

8:15-cv-01756
Bragel International, Inc. v. Styles for Less, Inc.

Cat Claws Inc
Eastern District of Arkansas

4:16-cv-00733
Cat Claws Inc v. Big Lots Stores Inc et al

Cocona, Inc.
District of Colorado

1:16-cv-02703
Cocona, Inc. v. Columbia Sportswear Company et al

Appendix A

Dexas International LTD
Northern District of Texas

3:17-cv-00147
Dexas International LTD v. Hitt Enterprises, Inc.

GAE GROUP, LLC
District of New Jersey

2:16-cv-09431
GAE GROUP, LLC et al v.
CARGO EQUIPMENT CORPORATION et al

Getagadget, LLC
Western District of Texas

1:16-cv-01240
Getagadget, LLC v. Porter World Trade, Inc.

Golden Rule Fasteners, Inc.
Middle District of Alabama

2:16-cv-01006
Golden Rule Fasteners, Inc. v.
Aztec Washer Company, Inc.

Gutterglove, Inc.
Eastern District of California

2:16-cv-01255
Gutterglove, Inc. v. Valor Gutter Guard et al

Appendix A

2:16-cv-02408
Gutterglove, Inc. v. Valor Gutter Guard et al

Ipowerup, Inc.
Central District of California

2:17-cv-00482
Ipowerup, Inc. v. Snow Lizard Products, LLC

J&H Web Technologies
Southern District of Texas

4:17-cv-00119
J&H Web Technologies LLC v.
Vade Retro Technology Inc.

Kolcraft Enterprises, Inc.
Northern District of Illinois

1:09-cv-03339
Kolcraft Enterprises, Inc. v. Chicco USA, Inc. et al

1:13-cv-04863
Kolcraft Enterprises, Inc. v. Artsana USA, Inc. et al

1:15-cv-07950
Kolcraft Enterprises, Inc. v.
Graco Children's Products Inc.

1:15-cv-07954
Kolcraft Enterprises, Inc. v.
Thorley Industries LLC d/b/a 4moms

Appendix A

Let's Go Aero, Inc.
District of Colorado

1:16-cv-00410
Let's Go Aero, Inc. v.
U-Haul International, Inc. et al

Liberty Pumps, Inc.
Western District of New York

6:16-cv-06123
Liberty Pumps, Inc. v. Franklin Electric Co., Inc.

Lincoln Electric Company et al
Northern District of Ohio

1:15-cv-01575
Lincoln Electric Company et al v.
Seabery Soluciones SL et al

Lola Style, Inc.
Southern District of Florida

1:15-cv-22591
Lola Style, Inc. v. U.S.A. Dawgs, Inc.

Merz North America, Inc.
Eastern District of North Carolina

5:15-cv-00262
Merz North America, Inc. v. Cytophil, Inc.

Appendix A

O.F. Mossberg & Sons, Inc.
District of Connecticut

3:12-cv-00198
O.F. Mossberg & Sons, Inc. v.
Timney Triggers, LLC

3:16-cv-00747
O.F. Mossberg & Sons, Inc. v.
Patriot Ordnance Factory, Inc.

3:16-cv-00748
O.F. Mossberg & Sons, Inc. v.
Elftmann Gun Products LLC

3:16-cv-00749
O.F. Mossberg & Sons, Inc. v. Black Rain Ordnance

3:16-cv-00751
O.F. Mossberg & Sons, Inc. v.
Battle Tested Equipment LLC

3:16-cv-00752
O.F. Mossberg & Sons, Inc. v.
Hogan Manufacturing LLC

3:16-cv-00766
O.F. Mossberg & Sons, Inc. v.
Franklin Armory Holdings Inc.

3:16-cv-00770
O.F. Mossberg & Sons, Inc. v. KE Arms, LLC

Appendix A

3:16-cv-00771
O.F. Mossberg & Sons, Inc. v.
2360216 ONTARIO INC.

3:16-cv-00773
O.F. Mossberg & Sons, Inc. v. DOA Arms LLC

Omix-ADA, Inc.
Northern District of Georgia

1:16-cv-03159
Omix-ADA, Inc. v. Liu et al

1:16-cv-03962
Omix-Ada, Inc. v. Rev Wheel, LLC et al

Paris Presents Incorporated
Northern District of Illinois

1:16-cv-07802
Paris Presents Incorporated v.
Lifestyle Products, LLC

Polyzen, Inc.
Eastern District of North Carolina

5:11-cv-00662
Polyzen, Inc. v. Radiadyne, LLC

5:14-cv-00323
Polyzen, Inc. v. Radiadyne, LLC

Appendix A

PRECISION FABRICS GROUP, INC.
Middle District of North Carolina

1:13-cv-00645
PRECISION FABRICS GROUP, INC. v.
TIETEX INTERNATIONAL, LTD.

1:14-cv-00650
PRECISION FABRICS GROUP, INC. v.
TIETEX INTERNATIONAL, LTD.

Rehco LLC
Northern District of Illinois

1:13-cv-02245
Rehco LLC v. Spin Master Ltd.

Stephens
Eastern District of Missouri

4:15-cv-00954
Stephens v. Ziegmann et al

Sub Zero Franchising
District of Utah

2:15-cv-00821
Sub Zero Franchising v. Frank Nye Consulting et al

Appendix A

Susan McKnight, Inc.
Western District of Tennessee

2:16-cv-02534
Susan McKnight, Inc. v.
United Industries Corporation

Tinnus Enterprises, LLC
Eastern District of Texas

6:15-cv-00551
Tinnus Enterprises, LLC et al v.
Telebrands Corporation et al

6:16-cv-00033
Tinnus Enterprises, LLC et al v.
Telebrands Corporation

6:16-cv-00034
Tinnus Enterprises, LLC v. Wal-Mart Stores Inc

TOJO Sea Below, LLC
Southern District of Florida

9:16-cv-81865
TOJO Sea Below, LLC v.
Diablo Royale Customs, LLC et al

Appendix A

Valencell, Inc.
Eastern District of North Carolina

5:16-cv-00001
Valencell, Inc. v. Apple Inc.

5:16-cv-00002
Valencell, Inc. v. Fitbit, Inc.

5:16-cv-00895
Valencell, Inc v. Bragi Store, LLC, et al

Word to Info Inc
Northern District of Texas

3:14-cv-04387
Word to Info Inc v. Facebook Inc

3:14-cv-04388
Word to Info Inc v. Google Inc